No. 89-1760 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IMMUNO, A.G.,

Petitioner,

vs.

JAN MOOR-JANKOWSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE STATE OF NEW YORK

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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Supplemental Memorandum for the Petitioner

Milkovich v. Lorain Journal, No. 89-645 (June 21, 1990), leaves an important libel law issue unresolved. This Court has not defined the plaintiff's burden as to falsity imposed by *Philadelphia Newspapers v. Hepps*, 475 U.S. 323, 106 S. Ct. 1558, 89 L. Ed. 2d 1201 (1986), as that burden obtains on a pretrial motion. That is precisely the second question presented by Immuno's petition for certiorari, and it takes on a heightened importance and a more urgent need for resolution after this Court's decision in

Milkovich.[1] Instead of having to wait for the issue to percolate through the lower courts for years, this Court has the rare opportunity to settle this important libel issue of constitutional dimensions, now, when the question is so timely.[2]

By holding in *Milkovich* that no separate Constitutional protection applies to expressions of opinion when a reasonable factfinder could conclude that the statement implies assertions capable of being proved false, this Court has already answered two of the three questions presented by Immuno on its petition for certiorari.

By deciding *Milkovich* in the manner it did, this Court has removed a major device used to deprive libel plaintiffs of redress. Dismissal at the pretrial stage had become the norm. In the words of this Court:

> "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment. *The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding*. . . We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false."

Milkovich v. Lorain Journal, No. 89-645 (June 21, 1990) (emphasis supplied). In *Milkovich*, the Court has implied that if a statement is capable of being proved false, and the

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[1]The list of Immuno's parent, subsidiary and affiliates is set forth in footnote 1 of Immuno's petition for certiorari.

[2]Sixteen years passed between the decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), and *Milkovich*.

plaintiff can show evidence from which a jury could conclude it was false, it should be left to a jury to decide if the statement is indeed false.[3] In Immuno's case, the Appellate Division recognized that there was indeed a falsity issue, but (erroneously, especially in the light of *Milkovich*) felt compelled by the First Amendment to *dispose* of the issue adversely to Immuno, instead of simply *identifying* the issue. This is beyond the requirements of the constitutional protections embodied in the substantive law of libel adequately secured by *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny, culminating in the requirement of proving falsity as set forth in *Hepps*. Indeed, the Appellate Division's focus was on fault, not falsity; it felt constrained to defend Moor-Jankowski's falsehood as understandable. Appendix, pp. 64-65.[4] In the course of illuminating plaintiff's pre-trial burden under *Hepps*, this Court ought to reverse that transparently erroneous result.

Now the test for actionability is whether or not a statement, whether of fact or opinion, can be proven true or false. However, the law of libel is once more in flux. For instance, the *New York Times* commentary on *Milkovich*, the day after the decision, said that the case would mean more

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[3]Such a result is not only consistent with this Court's decisions in *Milkovich* and *Hepps*, but is also consistent with *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986), wherein this Court held that a plaintiff may survive a defendant's motion for summary judgment on a showing of evidence on which a jury *might* return a verdict in his favor. 477 U.S. at 257, 106 S. Ct. at 2514-15, 91 L.Ed.2d at 217.

[4]There were at least two levels of falsity to Moor-Jankowski's statements, as will be developed more fully on brief. In a nutshell, (1) Moor-Jankowski knew that infectiousness *could* be determined, and (2) he knew that chimpanzees were not going to be released in any event. As to the latter point, he ignored facts that came into his possession between the time he got the first draft of the libel letter, and the time of publication, which shows that Immuno had agreed with the Government of Sierra Leone not to release any chimpanzees into the wild. *See* Petition at 4.

libel cases would go to trial, and quoted one commentator to the effect that it "may restore disorder to an area of the law that had become fairly orderly and predictable." Greenhouse, *High Court Narrows Shield in Libel Law*, N.Y. Times, June 22, 1990, at A17. By deciding exactly what a plaintiff has to show at the pre-trial stage to carry his *Hepps* burden, this Court can immediately resolve that timely issue, and avoid an unedifying replay of the state and lower federal courts all trying to guess this Court's view of the matter.

Whether or not this Court wants to resolve the falsity issue now, the fact remains that the New York Court of Appeals' decision is wrong because that decision was founded on the "classic" opinion doctrine, enormously overemphasizing the overall context of the statements at issue in a Letter to the Editor. *See* Petition Appendix, pp. 4-12.

The New York appellate courts rejected the significance of the core issue concerning falsity presented by Immuno. Simply put, Moor-Jankowski stated that Immuno's project had the potential to spread hepatitis in West Africa because there was no way to determine whether a chimpanzee exposed to the disease was capable of infecting others. Petition Appendix, pp. 99-100. Moor-Jankowski knew that statement to be false, because his own laboratory employed a test that showed whether a chimpanzee was infectious prior to release for breeding and rehabilitation. *See* Petition Appendix at 95.

The Appellate Division recognized that the test existed, but found it to be expensive and inexplicably held that Moor-Jankowski's admissions did not raise a triable issue of fact as to falsity. Petition Appendix pp. 64-65. In so doing, that court injected itself into the role of factfinder, resolving an issue of falsity which should have been left for resolution by the jury.

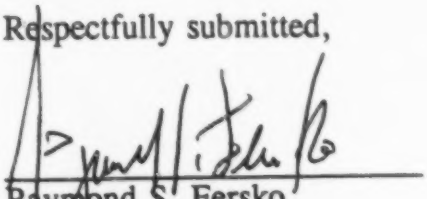
The *Milkovich* article was also tagged as opinion, and appeared in the sports pages, traditionally a forum for

energetic rhetoric. Indeed, as the *Milkovich* dissent makes clear, that article was much more unlikely to be taken seriously, given its context, than was Moor-Jankowski's authoritative libel in a refereed scientific journal. After *Milkovich*, to hold Moor-Jankowski's libel to be protected opinion is plainly reversible error. This Court should grant certiorari if only to reverse and remand for proceedings not inconsistent with *Milkovich*.

Conclusion

For these reasons, and for those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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